QUESTION PRESENTED

In a bankruptcy case, is an unsecured claim for unpaid premiums owing for a debtor's statutory workers' compensation liability insurance policy entitled to priority under Section 507(a)(4) of the Bankruptcy Code as a "contribution to an employee benefit plan arising from services rendered", as held by the Fourth and Ninth Circuits, or is such a claim not entitled to Section 507(a)(4) priority, as held by the Sixth, Eighth and Tenth Circuits?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All of the stock of Petitioner Howard Delivery Service, Inc. ("HDS"), is owned by an individual. HDS is the debtor in a chapter 11 bankruptcy case styled *In re Howard Delivery Service, Inc.*, Case No. 02-30289, pending in the United States Bankruptcy Court for the Northern District of West Virginia (the "Bankruptcy Proceedings").

Petitioner, the Official Committee of Unsecured Creditors of Howard Delivery Service, Inc. (the "Committee"), was duly appointed and serves as the official representative of unsecured creditors in the Bankruptcy Proceedings.

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CITATIONS OF OPINIONS AND ORDERS

The judgment of the United States Court of Appeals for the Fourth Circuit in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, C.A. No. 04-1136, decided March 24, 2005, reversing and remanding the memorandum opinion and order of the United States District Court for the Northern District of West Virginia, is set forth in the Appendix hereto and is published at 403 F.3d 228 (4th Cir. 2005) (App. 1a-38a).

The unpublished Memorandum Opinion and Order Affirming Order of the Bankruptcy Court, entered by the United States District Court for the Northern District of West Virginia in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, No. 3:03CV61, 2003 U.S. Dist. LEXIS 26464 (N.D.W.Va. December 22, 2003, as corrected December 23, 2003), is set forth in the Appendix hereto. (App. 39a-50a).

The unpublished Memorandum Opinion of the United States Bankruptcy Court for the Northern District of West Virginia, entered in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, BK No. 02-30289, 2003 Bankr. LEXIS 2142 (Bankr. N.D.W. Va. July 15, 2003), is set forth in the Appendix hereto (App. 51a-57a).

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, No. 04-1136, was entered on March 24, 2005 (App. A).

On June 10, 2005, within ninety days of the entry of judgment by the United States Court of Appeals for the Fourth Circuit, Petitioners filed their Application for an Extension of Time to File a Petition for a Writ of Certiorari in this Court. On June 15, 2005, The Chief Justice extended the time for filing a petition to and including July 22, 2005.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THE CASE

11 U.S.C. § 507(a)(4):

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

* * *

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plar , to the extent of –

(i) the number of employees covered by each such plan multiplied by $4,650, less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

29 U.S.C. § 1002

§ 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical,

surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186 of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provided retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * *

29 U.S.C. § 1003

§ 1003. Coverage

* * *

(b) The provisions of this title shall not apply to any employee benefit plan if—

* * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

* * * *

STATEMENT OF THE CASE

Petitioners HDS and the Committee seek review of the judgment of the United States Court of Appeals for the Fourth Circuit, expressed in the Court's *per curiam* opinion, two separate concurring opinions (Judges King and Shedd), and a dissenting opinion (Judge Niemeyer). The Fourth Circuit reversed the United States District Court for the Northern District of West Virginia (Judge Stamp), which had affirmed the United States Bankruptcy Court for the Northern District of West Virginia.

Both the District Court and the Bankruptcy Court held that a claim for unpaid premiums for workers' compensation insurance is not entitled to priority under Section 507(a)(4) of the Bankruptcy Code, in accord with the Sixth, Eighth

and Tenth Circuits. However, the Fourth Circuit, agreeing with the Ninth Circuit, reversed, and held that such a claim is entitled to priority under Section 507(a)(4) of the Bankruptcy Code.

HDS and the Committee respectfully submit that the Fourth Circuit erred in failing to follow the majority of the Circuit Courts that have considered this issue, and contend that Section 507(a)(4) of the Bankruptcy Code does not afford priority to claims for unpaid premiums for workers' compensation insurance because such premiums are not "contributions to an employee benefit plan, arising from services rendered".

For many years, HDS operated as an over-the-road freight carrier throughout the Midwest and Mid-Atlantic areas of the United States. It employed hundreds of truck drivers, mechanics, freight handlers, management and general administrative personnel. Due to the demise of a profitable business relationship with General Motors Corporation, HDS's business began to deteriorate in 2001. HDS wound down its operations, and eventually terminated its freight hauling operations entirely in the second half of 2001.

Prior to the Bankruptcy Proceedings, Zurich American provided insurance to HDS covering workers' compensation liability, general liability, cargo and automobile liability, effective from July 1, 1997 through January 22, 2002. The claim that is the subject of this petition, and that was addressed by the courts below, arises from unpaid premiums for workers' compensation insurance.

On January 30, 2002, HDS filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code. By order

entered March 7, 2003, the Bankruptcy Court confirmed the Second Amended Plan of Reorganization filed by the Committee. HDS no longer operates any business, and its assets consist of a few items of personal property yet to be liquidated, together with significant cash proceeds of its liquidation to be distributed to creditors. The proceeds held by HDS are not sufficient to pay all creditors in full.

On March 28, 2003, Zurich American filed Amended Proof of Claim No. 306 in the Bankruptcy Proceedings. Claim No. 306 was for unpaid premiums for workers' compensation insurance in the amount of $410,215.00. Zurich American alleged that this claim was entitled to priority pursuant to Section 507(a)(4) of the Bankruptcy Code.

The question presented in this petition, whether claims for unpaid workers' compensation insurance premiums are entitled to priority under Section 507(a)(4) of the Bankruptcy Code, came before the Bankruptcy Court upon HDS's Objection to Claim No. 306, wherein HDS contended, *inter alia*, that Claim No. 306 was not entitled to priority.

The Bankruptcy Court agreed with HDS, as did the District Court. The Fourth Circuit, however, reversed, and held that such insurance premiums constitute "contributions to an employee benefit plan, arising from services rendered", and that claims for unpaid workers' compensation insurance premiums are thus entitled to priority under Section 507(a)(4).

Jurisdiction in the court of first instance, the United States Bankruptcy Court for the Northern District of West Virginia, is founded upon 28 U.S.C. § 1334(a), and the Order of Reference of all cases filed under Title 11, United States Code, to that court, entered by the United States District Court for the Northern District of West Virginia.

REASONS FOR GRANTING THE PETITION

A. The Decision Entered by a Sharply Divided Fourth Circuit Court of Appeals is in Direct Conflict with the Decisions of Three Other Circuit Courts of Appeals on the Same Question Presented.

Under Section 507(a)(4) of the Bankruptcy Code ("Section 507(a)(4)"), Congress grants priority to contributions payable by an employer to an employee benefit plan. Section 507(a)(4) provides, in pertinent part, that:

> (a) The following expenses and claims have priority in the following order . . .
>
> (4) Fourth, allowed unsecured claims for **contributions** to an **employee benefit plan** –
>
> (A) arising from **services rendered** within 180 days before the date of the filing of the petition . . . ; but only
>
> (B) for each such plan, to the extent of –
>
> (i) the number of employees covered by each plan multiplied by $4,650; less
>
> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate

> on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(4) (emphasis added).

The Sixth, Eighth and Tenth Circuits all hold that claims for unpaid workers' compensation insurance premiums are not entitled to priority under Section 507(a)(4). On the other hand, the Ninth Circuit, and now the Fourth Circuit, construe Section 507(a)(4) so as to afford priority to a claim for these unpaid insurance premiums. *Compare Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc., (In re Birmingham-Nashville Express, Inc.)* 224 F.3d 511 (6th Cir. 2000); *State Ins. Fund v. Southern Star Foods, Inc., (In re Southern Star Foods)*, 144 F.3d 712 (10th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998), and *Employers Ins. v. Ramette, (In re HLM Corp.)*, 62 F.3d 224 (8th Cir. 1995) (all denying priority treatment), with *Employers Ins. v. Plaid Pantries*, 10 F.3d 605 (9th Cir. 1993) (affording priority treatment); and *Howard Delivery Serv., Inc. v. Zurich Am. Ins.*, 403 F.3d 228 (4th Cir. 2005) (*per curiam*).

Not only are the Circuit Courts split three to two on the application of Section 507(a)(4), but the Fourth Circuit panel itself was split two to one, and was unable to achieve a majority opinion. Ultimately, the Fourth Circuit issued a *per curiam* opinion, accompanied by two separate opinions concurring in the judgment, and one opinion dissenting from the judgment. Both the District Court and the Bankruptcy Court denied the priority claimed by Zurich American under Section 507(a)(4). The Fourth Circuit reversed these lower tribunals.

B. The Question Presented in this Case Regarding Priority of Claims is Important to Nearly Every Bankruptcy Case in which the Debtor Has Employees, and Should be Resolved by the Court.

One of the principal purposes of the Bankruptcy Code is to provide a means for the equitable distribution of the bankruptcy estate's limited resources. Section 507 of the Bankruptcy Code codifies a priority scheme for the various claims typically asserted by creditors in a bankruptcy case. Where a particular claim falls within the priority hierarchy established by Section 507 determines whether the claim will be paid in full, in part or perhaps not at all. In chapter 11 cases, claim priority also determines claim classification which affects plan voting and confirmation and thus potentially the success or failure of a debtor's reorganization efforts. The priority assigned to a particular claim is of critical importance, not only to the claimholder, but also to all parties in interest in a bankruptcy proceeding.

As all three judges on the Fourth Circuit panel observed, Section 507(a)(4) was enacted by Congress in 1978 specifically to expand priority status to include employee benefits in addition to "wages . . . due to workmen," which were already given priority under Section 104(a) (2) of the Bankruptcy Act, the predecessor to Section 507(a). Claims for unpaid employee benefits are often held on account of hundreds, sometimes thousands, of employees. The interpretation of Section 507(a)(4) will impact distribution in virtually all bankruptcy cases in which the debtor is an employer.[1]

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1. Under current law, Section 507(a)(4) provides that claims for contributions to an "employee benefit plan" are provided priority (Cont'd)

Most states require employers to carry workers' compensation insurance. As those employers slide into insolvency and eventually into bankruptcy, at least a portion of employee benefit plan obligations and workers' compensation insurance premiums will likely be unpaid, leaving the payment of those claims, and their priority, to be determined by the Bankruptcy Code. How Section 507(a)(4) is applied to workers' compensation insurance premiums will have a profound effect on how the priority claims of employee benefit plans are treated in pending and future bankruptcy cases.

C. The Decision of the Fourth Circuit Panel Majority is Fundamentally Flawed.

The holding of the Fourth Circuit is fundamentally flawed. In concluding that unpaid workers' compensation insurance premiums are entitled to priority status under Section 507(a)(4), Judge King, concurring in the judgment of the Fourth Circuit, first concludes that the relevant statutory terms "contributions," "employee benefits plan," and "services rendered," are plain and unambiguous. *Howard Delivery*, 403 F.3d at 232 (King, J., concurring); *Robinson v. Shell Oil Co*, 519 U.S. 337, 340 (1997) ("Our inquiry must

---

(Cont'd)

if those contributions arise from services rendered within the 180 days before the earlier of the filing of bankruptcy or cessation of the debtor's operations, but only to the extent of $4,925 per employee (less the amount paid to such employees as priority wage claims under Section 507(a) (3) of the Bankruptcy Code. The current cap went into effect on April 1, 2004, subsequent to the filing of Claim No. 306. Under the newly-enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the cap for employee benefit plan claims increases to $10,000 per employee.

cease if the statutory language is unambiguous . . .). To reach this conclusion, Judge King engages in a piecemeal inquiry as to the "ordinary meaning" of each term, drawing upon Webster's Third New International Dictionary. *See Howard Delivery*, 403 F.3d at 235-237, 244.

Using Webster's Dictionary, Judge King first concludes that HDS's unpaid workers' compensation insurance premiums constitute "contributions" within the meaning of Section 507(a)(4), because they include amounts "paid by an employer to [a] group insurance fund . . . for employees." *Howard Delivery*, 403 F.3d at 235 (quoting *Webster's Third New International Dictionary* 496 (reprint 1993) (1981)).

Judge King next reasons that the insurance coverage provided by HDS's workers' compensation insurance constitutes an "employee benefit plan" because it provides injured workers with cash payments under an insurance "plan". *See id.* at 236 (quoting selected portions from *Webster's Third)*.

Finally, Judge King concludes that the term "services rendered" is not limited to services provided by HDS's employees, but also includes the services rendered by others (*e.g.*, a workers' compensation insurer) that are attributable to the services rendered by HDS's employees. *See id.* at 238.

Even Judge Shedd, in a separate concurring opinion, finds the analysis of Judge King to be in error. First, Judge Shedd questions Judge King's conclusion that the terms contained in Section 507(a)(4) are unambiguous, noting that Judge King merely extracted *one* reasonable interpretation of these terms, not necessarily the *only* reasonable interpretation. Second, Judge Shedd acknowledges that while

specific terms used in Section 507(a)(4) may be unambiguous standing alone, the language of Section 507(a)(4), taken as a whole, nevertheless is ambiguous. *See id.* at 239 (Shedd, J. concurring).

However, in an effort to resolve the ambiguity of Section 507(a)(4), Judge Shedd improperly ascribes to the term "employee benefit plan", as used in Section 507(a)(4), the definition given to that phrase in the Employment Income Retirement Income Security Act of 1974 ("ERISA"). *See id.* at 240-41; 29 U.S.C. § 1002(3). Yet, these two statutes, ERISA and the Bankruptcy Code, cannot reasonably be read *in pari materia* and there is no indication that when Congress used the phrase "employee benefit plan" in Section 507(a)(4), it intended that the definition be fixed by ERISA.

Thus, Judge King failed to look beyond the individual terms used in Section 507(a)(4) in determining whether the statute, as a whole, was unambiguous. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 247 (1989) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") Judge Shedd properly determined that Section 507(a)(4) was ambiguous, but improperly confined his analysis of the statute to its ERISA counterpart.

The concurring opinions of Judge King and Judge Shedd both fail to undertake a proper inquiry into Section 507(a)(4)'s legislative history in order to glean Congress' intent in enacting Section 507(a)(4). Moreover, both opinions fail to give proper weight to a fundamental policy of the Bankruptcy Code, namely, that priority treatment of a claim is to be strictly and narrowly construed. *See Howard Delivery*,

403 F.3d at 232 (Niemeyer, J., dissenting). *See also Travelers Prop. Cas. Ins. Corp.*, 224 F.3d 511, 517 (noting that priorities established within the Bankruptcy Code, such as the priority under § 507(a)(4), should be narrowly construed, and that any language purported to create a priority must be "clear and explicit."); *Devan v. Simon Debartolo Group, L.P. (In re Merry-Go-Round Enterprises, Inc.)*, 180 F.3d 149, 157 (4th Cir. 1999) (noting that ". . . there is a general presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed . . .").

As Judge Niemeyer explained in his dissenting opinion, Section 507(a)(4) was enacted by Congress specifically to overrule two prior decisions of the Supreme Court which held that non-wage employee benefits were not entitled to priority in bankruptcy. *See id.* at 242. (Niemeyer, J., dissenting). The legislative history reveals that:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, which held that fringe benefits were not entitled to wage priority status. The bill recognizes the reality of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered.

Id. at 243. (Niemeyer, J., dissenting) (quoting H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (internal citation omitted)).[2] Judge Niemeyer properly

2. Section 507(a)(4) was also intended to overrule *Joint Industry Board v. United States*, 391 U.S. 224 (1968), which followed the reasoning in *United States v. Embassy Restaurant*.

recognizes that payment of an insurance premium for workers' compensation liability is not, and cannot be a "contribution" because it is a liability imposed by statute upon an employer in lieu of tort liability. *See id.* at 244.

Consistent with the Sixth, Eighth and Tenth Circuits, Judge Niemeyer properly recognizes that a workers' compensation insurance policy is not an employee benefit, because the workers' compensation scheme is anything but voluntary. *See id; See also In re HLM*, 62 F.3d 224, 226 (finding that a true benefit exists only in circumstances "where unless an employer offered a life insurance benefit plan, the employee would not necessarily have the coverage."); *In re Southern Star Foods, Inc.*, 144 F.3d 712, 717 (finding that mandatory workers' compensation coverage is more of a right mandated by statute than a bargained-for fringe benefit).

Finally, Judge Niemeyer aptly notes that the workers' compensation insurance "premium is not linked to the 'services rendered' by the employees as is required to qualify for priority status under § 507(a)(4)." *See Howard Delivery*, 403 F.3d at 244 (Niemeyer, J., dissenting).

Because Judge King failed properly to determine that Section 507(a)(4) is ambiguous and the plurality opinion failed to appropriately examine Section 507(a)(4)'s legislative history and give proper weight to the fundamental policy of the Bankruptcy Code that priorities be narrowly construed, the concurring opinions are fundamentally flawed.

CONCLUSION

For all of the reasons set out herein, and for such other reasons as may be apparent to the Court, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 24, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1136

IN RE: HOWARD DELIVERY SERVICE, INCORPORATED,

Debtor.

HOWARD DELIVERY SERVICE, INCORPORATED,

Debtor-Appellee,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Movant-Appellant.

AMERICAN HOME ASSURANCE COMPANY; HARTFORD FIRE INSURANCE COMPANY; THE TRAVELERS INDEMNITY COMPANY,

Amici Supporting Appellant.

Appeal from the United States District Court
for the Northern District of West Virginia, at Martinsburg,
Frederick P. Stamp, Jr., District Judge
(CA-03-61-3; BK-02-30289)

Appendix A

Argued: October 28, 2004.

Decided: March 24, 2005

Before NIEMEYER, KING, and SHEDD, Circuit Judges.

Reversed and remanded by published per curiam opinion. Judge KING wrote an opinion concurring in the judgment, Judge SHEDD wrote an opinion concurring in the judgment, and Judge NIEMEYER wrote an opinion dissenting from the judgment.

OPINION

PER CURIAM:

This appeal presents the question of whether the claim made by Zurich American Insurance Company against the estate of the debtor, Howard Delivery Service, Inc., for unpaid workers' compensation insurance premiums is to be given priority by reason of § 507(a)(4) of the Bankruptcy Code. The court holds that Zurich's claim is entitled to priority under § 507(a)(4) and therefore reverses the decision of the district court and remands the case for such further proceedings as may be appropriate.

REVERSED AND REMANDED

KING, Circuit Judge, concurring in the judgment:

In this appeal by Zurich American Insurance Company ("Zurich"), we are called upon to decide whether a claim by

Appendix A

Zurich for unpaid workers' compensation insurance premiums is entitled to priority status under § 507(a)(4) of the Bankruptcy Code. Zurich maintains that its claim is so entitled, asserting that such premiums constitute, under the applicable statutory provision, "contributions to an employee benefit plan arising from services rendered." 11 U.S.C. § 507(a)(4). Both the bankruptcy court and the district court disagreed with Zurich, relegating its claim to the status of a general unsecured creditor of the bankrupt Howard Delivery Service, Inc. ("Howard"). As explained below, I conclude, on this question of first impression, that Zurich's claim is entitled to § 507(a)(4) priority status.

I.

Under West Virginia law, employers in the state are required to "subscribe to and pay premium taxes into the [state's] workers' compensation fund for the protection of their employees." W. Va.Code § 23-2-1(a). In the alternative, an employer may self-insure by, among other requirements, demonstrating its financial ability to cover any workers' compensation claims that may arise. *Id.* at § 23-2-9. Howard, an over-the-road freight carrier operating in West Virginia, fulfilled its obligations under West Virginia law to become "self-insured" and purchased workers' compensation insurance coverage from Zurich (the "Policy").[1] The Policy became effective on July 1, 1997, and remained in effect until January 22, 2002, when it was cancelled by Howard.

1. Although not relevant to this appeal, Howard also purchased employer's liability and automobile liability policies from Zurich.

Upon cancellation, Howard owed Zurich thousands of dollars in unpaid premiums for coverage afforded by the Policy.[2]

On January 30, 2002, Howard filed a Chapter 11 bankruptcy petition in the bankruptcy court for the Northern District of West Virginia, seeking court protection in the reorganization of its business operations. On May 9, 2002, Zurich filed an unliquidated and unsecured creditor's claim in that proceeding, seeking priority status from the bankruptcy court for its claim for the unpaid premiums owed on the Policy.[3] On March 28, 2003, Zurich filed an amended proof of claim, specifically asserting that its claim was entitled to priority status under § 507(a)(4) of the Bankruptcy Code (the "Statute"), for contributions to an employee benefit plan in the sum of $410,215 (the "Zurich Claim").[4] Pursuant to the Statute, a creditor of a Chapter 11 debtor is authorized to recover on a fourth-level priority basis as follows:

---

2. The Policy provided coverage to Howard on a "claims incurred" basis; that is, claims incurred while the Policy was in effect were covered, regardless of when such claims might be made. The Policy was a high-deductible insurance plan, requiring Howard to reimburse Zurich for all losses up to $250,000.

3. Zurich filed another claim in Howard's bankruptcy proceeding on May 9, 2002—an unliquidated, unsecured, and nonpriority claim—which is not relevant to this appeal.

4. The amount of the Zurich Claim is premised on an actuarial analysis of Zurich's exposure to liability for claims incurred while the Policy was in effect. The Zurich Claim was admittedly slightly overstated, because it included a small amount owed under the automobile liability policy and covered a time period slightly in excess of 180 days.

Appendix A

(a) The following expenses and claims have priority in the following order:

. . . .

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first. . . .

11 U.S.C. § 507(a)(4).[5] On June 12, 2003, Howard filed an objection to the amount of the Zurich Claim, and specifically to Zurich's assertion that the Claim was entitled to priority status.

By an opinion filed on July 15, 2003, the bankruptcy court denied the Zurich Claim priority status, concluding that

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5. Creditors holding valid claims of fourth-level priority may recover from the general assets of a bankrupt's estate following, first, secured creditors, and second, unsecured creditors with claims qualifying under the first three levels of priority established by § 507(a). *See In re: Federal's Inc.*, 553 F.2d 509, 518 (6th Cir.1977). The first three levels of priority are: (1) administrative expenses and fees of the estate, (2) claims arising from the ordinary course of business, and (3) wages and salaries up to $4,925. *See* 11 U.S.C. § 507(a)(1)- (9) (creating nine priority levels).

unpaid workers' compensation premiums are not "bargained-for, wage-substitute-type benefits," relying on materials it identified in the legislative history of the Statute. *In re: Howard Delivery Serv., Inc.*, BK No. 02-30289, at *5 (Bankr.N.D.W.Va.) (the "Bankruptcy Opinion") (observing also that three courts of appeals had so ruled while only one had determined otherwise). Zurich appealed the Bankruptcy Opinion to the district court, which affirmed, on December 22, 2003, on similar grounds. *Howard Delivery Serv., Inc. v. Zurich Am. Home Ins. Co. (In re: Howard Delivery Serv., Inc.)*, No. 3:03CV61, at *11 (N.D.W.VA.) (the "District Opinion"). Zurich has now appealed to this Court, contending that the Zurich Claim is entitled to priority status because the unpaid insurance premiums embodied therein constitute "contributions to an employee benefit plan arising from services rendered" under the Statute. We possess jurisdiction to consider Zurich's appeal because, in these circumstances, the District Opinion and the corresponding Judgment in a Civil Case, filed on December 22, 2003, constitute a final decision of the district court under 28 U.S.C. § 158(d).[6]

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6. Subsection (d) of § 158 provides jurisdiction in the courts of appeals "from all final decisions, judgments, orders, and decrees [by a district court] entered under subsection (a)." It is generally acknowledged that the "finality" requirement of § 158(d) is to be interpreted in light of the special circumstances of bankruptcy proceedings. *See Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc.*, 828 F.2d 239, 241 (4th Cir.1987). And, as explained by Justice Breyer (then serving on the First Circuit) in a seminal decision on § 158(d) jurisdictional issues, *In re: Saco Local Development Corp.*, a district court's ruling in a priority dispute is typically an appealable ruling. 711 F.2d 441, 445 (1st Cir.1983) ("[A] 'final

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Appendix A

II.

Zurich's appeal concerns the meaning and application of the Statute, which constitutes a question of law that we review de novo. *See Loudoun Leasing Dev. Co. v. Ford Motor Credit Co.*, 128 F.3d 203, 206 (4th Cir.1997). In construing the meaning of a statutory provision, we are obliged to utilize the well-settled two-step process explained in a long series of decisions, including *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir.2004). First, we must ascertain whether the language of the statutory provision is plain or ambiguous. If the provision is drawn in plain and unambiguous terms, we simply apply the statute's plain meaning. Alternatively, if the language of the statutory provision is ambiguous, we proceed to the second step in the process and seek to ascertain the meaning intended by Congress when the provision was enacted. In the context of the Bankruptcy Code, it is presumed that a debtor's resources should be equally distributed among the creditors, and

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judgment, order, or decree' . . . includes an order that conclusively determines a separable dispute over a creditor's claim or *priority*.") (emphasis added).

The district court's ruling that the Zurich Claim was not entitled to priority effectively concluded the dispute between Zurich and Howard because the Zurich Claim was then rendered valueless. If the Zurich Claim is not now accorded priority status, Zurich becomes another general unsecured creditor of Howard, and it is agreed that Zurich would then receive nothing from Howard's bankrupt estate. Furthermore, if it loses this appeal, Zurich has agreed to withdraw the Zurich Claim.

statutory priorities are therefore to be narrowly construed. *See In re: Merry-Go-Round Enter., Inc.*, 180 F.3d 149, 157 (4th Cir.1999) (observing general "presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed among creditors").

III.

In assessing whether the Zurich Claim is entitled to priority status under the Statute, I first briefly review the split of authority in the federal courts as to whether claims for unpaid insurance premiums are so entitled. As explained below, I am of the view that the pertinent statutory terms—"contributions," "employee benefit plan," and "services rendered"—are plain and unambiguous. I am therefore obliged to apply the Statute to the Zurich Claim and, in so doing, conclude that it is entitled to priority status thereunder.

A.

The issue presented by Zurich has been previously considered by several other courts, and they disagree on whether a debtor's unpaid premiums for workers' compensation insurance constitute "contributions to an employee benefit plan arising from services rendered," and on whether a bankruptcy claim for such premiums is thereby entitled to fourth-level priority status under the Statute. *Compare Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc. (In re: Birmingham-Nashville Express, Inc.)*, 224 F.3d 511 (6th Cir.2000) (denying priority status), *State Ins. Fund v. S. Star Foods, Inc. (In re: S. Star Foods, Inc.)*, 144 F.3d 712 (10th Cir.1998) (same), *and*

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Employers Ins. of Wausau, Inc. v. HLM Corp. (In re: HLM Corp.), 62 F.3d 224 (8th Cir.1995) (same), *with Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir.1993) (affording priority status). This disagreement among the courts rests upon opposing constructions of the Statute: the Ninth Circuit (and various district and bankruptcy courts) deeming the Statute to be unambiguous and affording priority to such claims; while the Sixth, Tenth, and Eighth Circuits (as well as several district and bankruptcy courts) have concluded that the Statute's legislative history precludes priority status being accorded to such claims. These divergent views deserve some further examination.

1.

The first line of decisions addressing bankruptcy claims for unpaid insurance premiums, including the Ninth Circuit's decision in *Plaid Pantries*, has found the Statute to be unambiguous, and thus reasoned that legislative history need not be considered. Relying on the Statute's plain meaning, those courts have concluded that the Statute accords priority status to such claims as "contributions to an employee benefit plan arising from services rendered" under the Statute. *See Plaid Pantries*, 10 F.3d at 607 (according priority status to claim for unpaid workers' compensation premiums); *Saco*, 711 F.3d at 449 (according priority status to claim for unpaid employee group life, health, and disability insurance premiums); *Ivey v. Great W. Life & Annuity Ins. Co.*, 308 B.R. 752 (M.D.N.C.2004), *appeal docketed*, No. 04-1576 (4th Cir.2004) (according priority status to claim for unpaid health insurance premiums); *Principal Mut. Life Ins. Co. v. Joint Comm. of Unsecured Creditors (In re: CirrusCorp)*,

196 B.R. 76 (S.D.Tex.1996) (same); *Allegheny Int'l, Inc. v. Metro. Life Ins. Co.*, 145 B.R. 820 (W.D.Pa.1992) (according priority status to claim for unpaid life insurance premiums); *Official Labor Creditors Comm. v. Jet Fla. Sys., Inc. (In re: Jet Fla. Sys., Inc.)*, 80 B.R. 544 (S.D.Fla.1987) (according priority status to claim for unpaid reimbursements for covered medical expenses); *In re: Integrated Health Servs., Inc.*, 291 B.R. 611 (Bankr.D.Del.2003) (according priority status to claim for unpaid workers' compensation insurance premiums); *In re: A.B.C. Fabrics of Tampa, Inc.*, 259 B.R. 759 (Bankr.M.D.Fla.2001) (according priority status to claim for unpaid reimbursements for covered medical expenses); *In re: Braniff, Inc.*, 218 B.R. 628 (Bankr.M.D.Fla.1998) (according priority status to claim for unpaid health and life insurance premiums); *Official Creditors' Comm. of Lummus Indus., Inc. v. Blue Cross & Blue Shield of Ga., Inc. (In re: Lummus Indus., Inc.)*, 193 B.R. 615 (Bankr.M.D.Ga.1996) (according priority status to claim for unpaid health insurance premiums); *see also Perlstein v. Rockwood Ins. Co. (In re: AOV Indus., Inc.)*, 85 B.R. 183 (Bankr.D.D.C.1988) (noting, albeit in dicta, that unpaid workers' compensation premiums are entitled to priority status).

In this series of decisions, the courts that have assessed the priority status of claims premised on unpaid workers' compensation premiums have found such claims to be indistinguishable from claims of priority status involving other types of employer-provided insurance benefits, *e.g.*, health, disability, or life insurance. *See Plaid Pantries*, 10 F.3d at 607; *Integrated Health Servs.*, 291 B.R. at 613. Indeed, the Statute fails to distinguish between an "employee benefit plan" that an employer is statutorily required to

provide to its employees, *i.e.*, workers' compensation, and a benefit plan that an employer voluntarily decides to provide. The courts adopting the plain meaning view of the Statute have thus concluded that bankruptcy claims for unpaid workers' compensation premiums, like those for unpaid health, disability, and life insurance premiums, are entitled to priority status under the Statute.

2.

On the other hand, three of our sister circuits, as well as several of the lower courts, have turned to and relied on aspects of the Statute's legislative history in concluding that claims for unpaid workers' compensation premiums are somehow different from claims for premiums to voluntarily provided benefit plans, and that claims for unpaid workers' compensation premiums are not entitled to priority status as "contributions to an employee benefit plan" under the Statute. *See Birmingham-Nashville,* 224 F.3d at 517 (holding unpaid workers' compensation premiums are not entitled to priority status); *S. Star Foods,* 144 F.3d at 715-17 (same); *HLM Corp.*, 62 F.3d at 225 (same); *In re: Allentown Moving & Storage,* 214 B.R. 761 (E.D.Pa.1997) (same); *Edward W. Minte Co. v. Franey & Parr (In re: Edward W. Minte Co.)*, 286 B.R. 1, 8-13 (Bankr.D.D.C.2002) (same); *In re: Perk Dev. Corp. Brambury Assocs.*, 246 B.R. 753 (Bankr.W.D.N.Y.2000) (same); *In re: Arrow Carrier Corp.*, 154 B.R. 642 (Bankr.D.N.J.1993) (same); *see also In re: AER-Aerotron, Inc.*, 182 B.R. 725 (Bankr.E.D.N.C.1995) (denying priority status to claim for unpaid life insurance premiums).

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Congress enacted the Statute in 1978 in an effort to abrogate two Supreme Court decisions which had construed the terms "wages" and "commissions" of the priority provision of the predecessor statute, the Bankruptcy Act of 1898. *Joint Indus. Bd. of Elec. Indus. v. United States*, 391 U.S. 224 (1968); *United States v. Embassy Rest., Inc.*, 359 U.S. 29 (1959). In those decisions, the Court had held that the wage priority provision of the 1898 Act failed to afford priority status to claims for contributions to bargained-for, union-operated welfare and annuity funds. *Joint Indus.*, 39 U.S. at 228; *Embassy Rest.*, 359 U.S. at 33. Congress, in enacting the Statute, sought to ensure that the employees of bankrupt employers received priority on claims not just for their wages, but also for wage substitutes provided through "employee benefit plan[s]". *S. Star Foods*, 144 F.3d at 715-16 (relying on H.R.Rep. No. 95-595, at 187, 357 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 and S.Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855).

The line of decisions relying on the Statute's legislative history have generally concluded that a workers' compensation plan does not constitute a wage substitute and is not an "employee benefit plan" under the Statute, because workers' compensation is statutorily mandated.[7] *See HLM*

7. None of the decisions taking this view has held that an "employee benefit plan" under the Statute must have resulted from collective bargaining. Indeed, the Sixth Circuit specifically rejected such an assertion, agreeing with the First Circuit's decision in *Saco*, stating: "we do not hold that to qualify for priority under § 507(a)(4) the wage substitute must actually be the product of collective bargaining." *Birmingham-Nashville*, 224 F.3d at 517 (relying on *Saco*, 711 F.2d at 449).

Corp., 62 F.3d at 225; *S. Star Foods*, 144 F.3d at 715; *Birmingham-Nashville*, 224 F.3d at 517. For example, the Sixth Circuit observed that: "[w]orkers' compensation is not a wage substitute; rather, it is an award arising out of a work-related injury *owed* by an employer." *Birmingham-Nashville*, 224 F.3d at 517 (emphasis added). More specifically, because workers' compensation coverage is statutorily mandated, an employer cannot offer its employees higher wages as a substitute for those benefits. *HLM Corp.*, 62 F.3d at 226. Because employees are, in that circumstance, entitled to workers' compensation benefits under law, the Eighth Circuit observed that, "even if the employer were illegally uninsured, the employers' participation in a workers' compensation insurance fund cannot be understood as a true benefit." *Id.*

B.

In order to ascertain which of these competing views to adopt, I must, pursuant to the applicable principles of statutory construction, first decide whether the Statute has a plain and unambiguous meaning. *Newport News Shipbldg.*, 376 F.3d at 248; *see Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 7 (2000) (admonishing that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms") (citations omitted). In enacting the Statute, Congress failed to define the terms "contributions," "employee benefit plan," or "services rendered," as they are used therein, nor has the Supreme Court construed those terms. Where, as here, a statutory provision fails to expressly define the terms to be

assessed, we are obliged to construe them in accordance with their ordinary or natural meaning. *FDIC v. Meyer,* 510 U.S. 471, 476 (1994).

In these circumstances, in order to ascertain whether the Statute is plain or ambiguous, I will assess separately the ordinary and natural meanings of the pertinent statutory terms, *i.e.*, "contributions," "employee benefit plan," and "services rendered." As explained below, although I am sensitive to the principle that bankruptcy priorities are to be interpreted narrowly, *see In re: Merry-Go-Round Enter., Inc.*, 180 F.3d 149, 157 (4th Cir.1999), each of those terms is plain and unambiguous, and the Zurich Claim is therefore entitled to priority status under the Statute.

1.

First of all, an accepted and ordinary meaning of the term "contributions" is that they include sums "paid by an employer to [a] group-insurance fund . . . for employees." *Webster's Third New International Dictionary* 496 (reprint 1993) (1981). Importantly, a contribution need not be a payment that is voluntarily made. *Birmingham-Nashville,* 224 F.3d at 516 (observing that "employer's statutorily mandated payment to an employee benefit plan . . . is no less of a 'contribution' to such a fund simply because it is mandated by statute"). Applying this meaning of the term "contributions" to these circumstances, Howard's unpaid premiums on the Policy constitute sums to be paid by an employer to a group insurance fund for workers'

compensation insurance, and constitute "contributions" within the meaning of the Statute.[8]

2.

Second, the insurance coverage provided by the Policy for Howard's workers' compensation liabilities constitutes an "employee benefit plan" as that term is used in the Statute. As explained below, I reach this conclusion because a workers' compensation plan constitutes an "employee benefit plan" under the Statute, and because the insurance coverage purchased by an employer to cover such a plan is also an "employee benefit plan."[9]

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8. In concluding that the unpaid insurance premiums owed to Zurich are contributions, I necessarily reject the view that a contribution does not include the unilateral purchase of such a product or service, because a contribution, as defined by *Random House,* means *inter alia,* giving "*along with others.*" *Birmingham-Nashville,* 224 F.3d at 515 (quoting *Random House Dictionary of the English Language* 308 (1981) (emphasis added)). Because the bankrupt employer in the *Birmingham-Nashville* proceeding was, like Howard, the sole purchaser of an insurance policy, its unpaid premiums were deemed not to constitute contributions. *Id.* I see this as an overly narrow interpretation of the term "contributions," precluding the existence of a sole contributor and denying priority status to claims for unpaid life, health, and disability insurance premiums. Claims for such unpaid insurance premiums have been accorded priority status by the First Circuit in *Saco,* and by multiple district and bankruptcy courts. *See Saco,* 711 F.2d at 441; *see also supra* Part III.A.1.

9. Certain bankruptcy courts have found the ERISA definition of "employee benefit plan" to be useful in construing the

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a.

A workers' compensation insurance program constitutes a detailed contractual arrangement enabling an employer to provide health, disability, lost-wage, and death benefits to employees who are injured in the course of their employment. As the bankruptcy and district courts recognized in this case, the benefits of workers' compensation coverage plainly inure to those employees who receive payments thereunder. *See* Bankruptcy Opinion at *5 (workers' compensation is "unarguably a benefit for employees"); District Opinion at *11 (workers' compensation is "of great benefit to employees"). Next, a "benefit" is, *inter alia,* "a cash payment provided for under an . . . insurance plan," or "financial help in time of sickness, old age, or unemployment." *Webster's Third* 204. Under West Virginia workers' compensation law, employees receive benefits from an insurance plan, such as that provided by the Policy, to assist them when work-related injuries result in sickness or unemployment. *See Repass v.*

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meaning of the Statute, because, under ERISA, workers' compensation is identified as an "employee benefit plan." *See* 29 U.S.C. §§ 1002(1)-(3), 1003(b); *see, e.g., Allegheny Int'l, Inc. v. Metro. Life Ins. Co. (In re: Allegheny Int'l, Inc.),* 138 B.R. 171, 173-74 (Bankr.W.D.Pa.1992), *aff'd,* 145 B.R. 820 (W.D.Pa.1992). However, "[m]ost federal courts . . . have rejected this reasoning." *Birmingham-Nashville,* 224 F.3d at 517. Importantly, the Supreme Court has held that, for purposes of construing terms found in the Bankruptcy Code, it is inappropriate to incorporate characterizations of a term in another statute absent some congressional indication that this was intended. *United States v. Reorganized CF & I Fabricators of Utah, Inc.,* 518 U.S. 213, 225 (1996). I therefore decline to rely upon the ERISA definition.

Workers' Comp. Division, 569 S.E.2d 162, 168-69 (W.Va. 2002) ("The Act is designed to compensate injured workers . . . in order that injured workers and those who depend upon them for support shall not be left destitute during a period of disability."). Finally, a "plan" constitutes, *inter alia,* "a detailed and systematic formulation of a large-scale campaign or program of action." *Webster's Third* 1729. Applying that definition, workers' compensation insurance, as a detailed arrangement between employees and employers, readily constitutes such a "plan." Workers' compensation insurance is thus an "employee benefit plan" within the plain meaning of that statutory term.

I acknowledge, and respectfully so, that three of the four courts of appeals to face this question have disagreed, taking the view that workers' compensation insurance coverage does not constitute an "employee benefit plan." We are unable to decide such an issue by a poll of the courts, however, and I view the contrary reasoning of those courts as unpersuasive. *See McMellon v. United States,* 387 F.3d 329 (4th Cir.2004) (en banc) (Luttig, J., dissenting) ("Judicial interpretation is not an exercise in poll-taking.") The courts adopting the contrary view have relied on aspects of the Statute's legislative history to interpret the term "employee benefit plan," and they have consistently done so without first deciding that the statutory term is ambiguous. Indeed, the Eighth Circuit concluded that the plain meaning of the term "employee benefit plan" militated against affording priority based upon the legislative history of the Statute. *HLM Corp.,* 62 F.3d at 225 (observing that since Bankruptcy Code did not define term, "the legislative history is instructive and illuminating" without addressing term's plain meaning). The

Tenth Circuit simply concluded that a split in the circuits was sufficient evidence that the statutory provision was ambiguous. *S. Star Foods,* 144 F.3d at 715 ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase 'contributions to an employee benefit plan'. . . ."). [10] And the Sixth Circuit reasoned that the term "employee benefit plan" is ambiguous by first looking, inappropriately, to the Statute's legislative history. *Birmingham-Nashville,* 224 F.3d at 517 (holding that "it is not at all clear" what "employee benefit plan" means and citing *Embassy Restaurant* decision for authority that term is limited to "wage substitutes," without addressing plain meaning). In our view, these decisions fail to heed the Court's admonishment that "when the [Bankruptcy Code's] language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters,* 530 U.S. at 7 (citations omitted).

The language of the Statute is plain and unambiguous—it does not require that compensation received by an employee be a "wage substitute," nor does it exclude an employee benefit plan that is statutorily mandated.[11] Put simply, we

10. I see this point as unpersuasive. As Justice Thomas has aptly observed, "[a] mere disagreement among litigants over the meaning of a statute does not itself prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of A. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 461 (1991) (Thomas, J., concurring).

11. *See also In re: Integrated Health Servs., Inc.*, 291 B.R. 611 (Bankr.D.Del.2003) (making comprehensive analysis of statute and pertinent legislative history, and according priority status to claim for unpaid workers' compensation insurance premiums).

are not entitled to require an employee benefit plan to qualify as a wage substitute or to require that participation in such a plan be voluntary, thereby engrafting limitations on statutory provisions in order to "achieve that which Congress is perceived to have failed to do." *United States v. Locke,* 471 U.S. 84, 95 (1985); *see also Pavelic & LeFlore v. Marvel Entm't Group,* 493 U.S. 120, 126 (1989) ("our task is to apply the text, not improve on it"). In sum, the plain language of the Statute accords priority to contributions made to an "employee benefit plan" and, applying the relevant statutory provisions, workers' compensation insurance coverage constitutes such a plan.

b.

Turning next to the question of whether this particular Policy constitutes an "employee benefit plan," within the meaning of the Statute, I conclude that it does. The Policy constitutes such a "plan," in that it is a "detailed and systematic formulation of a large-scale . . . program of action." *Webster's Third* 1729. The district court concluded otherwise, finding that the Policy failed to benefit Howard's employees, and that it benefitted Howard only, because "the insurance is designed to shield Howard from the liability of providing workers' compensation benefits." District Opinion at *10.

Notwithstanding the benefits accruing to Howard under the Policy, the insurance coverage provided thereunder plainly inured to the benefit of Howard's employees. Zurich was obliged to pay Howard's workers' compensation claims and be partially reimbursed by Howard pursuant to the

Policy's provisions. As a result, the Policy directly benefitted the Howard employees who received compensation. *See Ivey v. Great W. Life & Annuity Ins. Co. (In re: Ivey),* 308 B.R. 752, 757 (M.D.N.C.2004) ("the plain language of the statute . . . include[s] priority for an insurance company which has expended its own funds to make the plan work"). That the Policy may also have benefitted Howard is not controlling, because it unquestionably provided an "employee benefit" under the plain and unambiguous meaning of that term.

Nearly all the courts addressing the issue have ruled that claims for unpaid health, disability, and life insurance premiums are entitled to priority status under the Statute, and that those types of insurance constitute a benefit to employees.[12] *See supra* Part III.A.1. And of import here, the coverage provided by workers' compensation insurance is indistinguishable, under the Statute, from those other types of insurance. As Justice Breyer aptly observed in *Saco:* "[t]o allow the insurer to obtain its premiums through priority would seem the surest way to provide employees with the policy benefits to which they are entitled." 711 F.2d at 449.

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12. In resolving this issue I am impressed with the reasoning of the recent decision of the Middle District of North Carolina on the question of whether a claim for unpaid insurance premiums is entitled to priority status. *Ivey,* 308 B.R. at 755-57. That court makes a comprehensive analysis of this issue, concluding that such a claim is entitled to priority status under the Statute. *Id.* at 756 (observing that statutory language "appears to allow priority for insurers or any other parties who make contributions to the plan"). Because the court deemed the "plain language" of the Statute to be unambiguous, it had no reason to "look beyond the text of the statute to the legislative history." *Id.* at 757.

As with health, disability, and life insurance, workers' compensation coverage conveys a benefit to employees, and the Zurich Claim arises from an "employee benefit plan."

3.

Finally, Howard asserts that the meaning of the term "services rendered," as found in the Statute, is limited to those services rendered by its employees and does not include services rendered by an insurer such as Zurich. *See Edward W. Minte Co. v. Franey & Parr (In re: Edward W. Minte Co.)*, 286 B.R. 1, 8-13 (Bankr.D.D.C.2002).[13] It contends that, because the Zurich Claim arises from the provision of insurance coverage by Zurich, rather than from services rendered by Howard's employees, the Claim does not fall within the plain meaning of "services rendered" under the Statute. *Id.*

I reject Howard's contention on this point because it seeks to inappropriately limit the breadth of the relevant term. I am again content to follow Justice Breyer's guidance in *Saco* that insurers may be entitled to priority under the Statute. 711 F.2d at 449. Regardless of whether the term "services rendered" refers to the provision of insurance or is limited to employees' services, the Zurich Claim satisfies this aspect of the Statute. It is only because workers were employed by Howard (and providing services to it) prior to the bankruptcy filing that Howard's obligation to provide

13. Under the *Minte* decision, on which Howard relies for this contention, only employees or administrators of employee benefit plans who represent employee interests may recover under the Statute. 286 B.R. at 10.

insurance and pay the necessary premiums arises. The Zurich Claim thus arises from "services rendered" by Howard's employees, *i.e.*, their services occasioned Howard's obligation to purchase workers' compensation insurance, and by Zurich as well, *i.e.*, providing insurance.[14]

IV.

Pursuant to the foregoing, the Zurich Claim is entitled to priority under the Statute. I therefore concur in the judgment to reverse the decision of the district court and remand for such further proceedings as may be appropriate.

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14. Because the language of the Statute is plain and unambiguous, I decline Howard's invitation to examine its legislative history. Conducting such an analysis "would require a radical abandonment of our long-standing precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 124 S.Ct. 1587, 1595 (2004).

Appendix A

SHEDD, Circuit Judge, concurring:

While I appreciate Judge King's well-crafted opinion and concur in its result, I base my opinion on a different rationale. Our paths diverge on the issue of whether the phrase "employee benefit plan" in § 507(a)(4) is ambiguous. Judge King finds the individual words of this phrase to be unambiguous, but I find the phrase as a whole to be ambiguous. In ascertaining the meaning of this ambiguous phrase, I rely on specific evidence in the statute's legislative history showing that Congress likely intended to import the definition of the term "employee benefit plan" from ERISA to this particular bankruptcy priority provision. Under ERISA, "employee benefit plan" includes workers' compensation benefit plans. Thus, when Congress enacted § 507(a)(4), it granted priority protection to contributions to workers' compensation plans.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (holding that the term "employee" in Title VII is ambiguous in its context). In determining whether a statute is plain or ambiguous, a court must consider the specific language employed, the specific context of that language, and the broader context of the statute as a whole. *Id.* at 341. A statute is ambiguous if its language is susceptible to more than one reasonable interpretation. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir.2004). "If the statutory language is clear and unambiguous, our inquiry ends there." *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653

(4th Cir.1996). If, however, a statute is ambiguous, resort to legislative history is appropriate. *BedRoc Ltd. v. United States,* 541 U.S. 176, __, 124 S.Ct. 1587, 1595 (2004).

In deciding that § 507(a)(4) is unambiguous, Judge King picks and chooses from accepted dictionary definitions of the words "benefit" and "plan" and concludes that an "employee benefit plan" is any "cash payment provided for under an . . . insurance plan" or "financial help in time of sickness, old age, or unemployment" to an employee that is paid according to "a detailed and systematic formulation of a large-scale campaign or program of action." Although this definition might be one reasonable interpretation of these words, it is not the *only* reasonable interpretation. For instance, in common usage the phrase "employee benefit plan" can refer to a package of "fringe benefits," which may or may not include workers' compensation benefits. *See, e.g.,* 29 C.F.R. § 1625.10(b) (2005) (stating that, for purposes of the Age Discrimination in Employment Act, an "employee benefit plan" is a plan that "provides employees with what are frequently referred to as 'fringe benefits' "); *Employee Fringe Benefits: Tax Policy Issues,* Management Matters, Sept. 1, 1992 (listing the four most common "fringe benefits" as pensions, health insurance, life insurance, and flexible benefit programs). Moreover, the context of the statute suggests that Congress could have intended the phrase "employee benefit plan" to be a term of art having a specific meaning different from the sum of what these three words mean individually. Accordingly, because the term "employee benefit plan" is susceptible to more than one reasonable interpretation, it is appropriate to consider the legislative

history of § 507(a)(4) to determine what Congress intended by using this particular language. *See BedRoc,* 124 S.Ct. at 1595.

As originally introduced in 1975, the new priority for "employee benefit plans" included "allowed claims for contributions to *pension, insurance, or similar employee benefit plans* . . . ." H.R. 31, 94th Congress (1975) (emphasis added). In hearings before the Judiciary Committee of the United States House of Representatives, one important witness—a union official representing more than a dozen affiliated unions and several million tradesmen—suggested that the legislation could be interpreted too narrowly and should therefore be amended "so as not inadvertently to exclude certain other types of plans." Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong. 2452 (1976). To broaden the coverage of the priority, this witness urged Congress to delete the words "pension, insurance, or similar" and instead parallel the language of ERISA. *Id.* Thus, "[t]he contributions for which priority treatment should be granted should be any contributions to an employee benefit plan as defined in *ERISA § 3(3).*" *Id.* at 2455. (emphasis added).

The priority was enacted into law two years later as part of the Bankruptcy Reform Act of 1978, Pub.L. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 507(a)(4)). Congress enacted the exact wording proposed in the House Judiciary Committee hearing two years earlier, so that the priority applies to "allowed unsecured claims for contributions to an employee benefit plan." 11 U.S.C. § 507(a)(4).

In this particular instance, the best evidence as to what Congress intended by incorporating the term "employee benefit plan" comes not from attempting to ascertain the overriding purposes and aims of the legislation.[1] Instead, we have a direct indication from the legislative history that Congress intended to give this particular term the same meaning that it had given to that same term just four years earlier when it enacted ERISA. *See* Employee Retirement Income Security Act of 1974, Pub.L. 93-406, 88 Stat. 829. Accordingly, I conclude that Congress intended the phrase "employee benefit plan" in the bankruptcy priority provision to have the same meaning that it has in ERISA.[2]

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1. I note, however, that my approach is also consistent with the Congressional purpose and aim of the legislation. Language in the House Committee Report explaining the purpose of the new priority provision suggests that workers' compensation plans are entitled to priority. That Report states that the new priority will cover contributions and payments to plans including "health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that is not in the form of wages." H.R.Rep. No. 95-595, at 6148 (1977). Under this very broad language, workers' compensation would qualify as "employee compensation that is not in the form of wages."

2. Relying on *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996), Judge King rejects the ERISA definition because it is "inappropriate to incorporate characterizations of a term in another statute absent some congressional indication that this was intended." This contention ignores the indication of Congress's intent in the legislative history. The plain facts that (1) Congress was urged to make § 507(a)(4) consistent with ERISA and (2) Congress subsequently amended the provision to employ the very same term that is used in ERISA provides "some congressional

(Cont'd)

Appendix A

ERISA § 3(3) defines the term "employee benefit plan" to mean "an *employee welfare benefit plan* or an employee pension benefit plan. . . ." 29 U.S.C. § 1002(3) (emphasis added). An "employee welfare benefit plan" is:

> any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

29 U.S.C. § 1002(1). Based on these definitions, the workers' compensation insurance plan at issue in this case qualifies as an "employee benefit plan." The plan at issue was established by Howard Delivery Service through the purchase of insurance and was maintained for the purpose of providing benefits in the event of sickness, accident, disability or death of the employees.[3]

(Cont'd)

indication" that "employee benefit plan" should have the same meaning in both statutes. Simply, Congress used a special term it had used in the recent past with knowledge of what that term meant.

3. ERISA § 4(b)(3) further confirms that the term "employee benefit plan" includes workers' compensation plans. This code section provides:

(Cont'd)

Appendix A

Because Congress enacted an ambiguous statute, we must ascertain from the statute's legislative history which types of plans Congress meant to include in this new bankruptcy priority. In my view, the best evidence reveals that Congress intended the term "employee benefit plan" in § 507(a)(4) to share the same meaning as "employee benefit plan" under ERISA. A workers' compensation insurance plan is an "employee benefit plan" under ERISA, and it necessarily follows that a workers' compensation plan qualifies as an "employee benefit plan" under § 507(a)(4) of the Bankruptcy Code. Accordingly, I concur with Judge King that the Zurich Claim is entitled to priority and that the judgment of the district court should be reversed.

(Cont'd)

> (b) The provisions of this subchapter shall not apply to any *employee benefit plan* if—
>
> . . .
>
> (3) such plan is maintained *solely* for the purpose of complying with applicable *workmen's compensation* laws . . . .

29 U.S.C. § 1003(b)(3) (emphasis added). In other words, all workers' compensation plans are "employee benefit plans" under ERISA's definition, but ERISA does not govern all "employee benefit plans," including some workers' compensation plans. *See PPG Indus. Pension Plan v. Crews*, 902 F.2d 1148, 1151 (4th Cir.1990) (deciding that ERISA applies to company's employee benefit plan providing workers' compensation benefits because it was not maintained solely for the purpose of complying with West Virginia's workers' compensation laws).

Appendix A

NIEMEYER, Circuit Judge, dissenting:

The sole question in this appeal is whether the claim of Zurich American Insurance Company filed against the estate of Howard Delivery Service, Inc., the debtor in bankruptcy, for unpaid workers' compensation insurance premiums is given priority by § 507(a)(4) of the Bankruptcy Code. Because such premiums are plainly not—as the statute requires they must be—"contributions to an employee benefit plan arising from services rendered," 11 U.S.C. § 507(a)(4), I would affirm the judgment of the district court denying priority for Zurich's claim.

In holding that claims for unpaid workers' compensation insurance premiums enjoy the same priority as claims for unpaid employee fringe benefits, the judgment of the majority widens a split among the circuits, joining the Ninth Circuit as the only circuit that has so held. *See Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir.1993). The other three circuits that have considered this issue have held that claims for unpaid workers' compensation insurance premiums do not fall within the statutory language of § 507(a)(4) and therefore do not enjoy the priority afforded by that section. *See Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc. (In re: Birmingham-Nashville Express, Inc.)*, 224 F.3d 511 (6th Cir.2000); *State Ins. Fund v. Southern Star Foods, Inc. (In re: Southern Star Foods, Inc.)*, 144 F.3d 712 (10th Cir.1998); *Employers Ins. of Wausau, Inc. v. HLM Corp. (In re: HLM Corp.)*, 62 F.3d 224 (8th Cir.1995). Because I believe that the decisions of these three circuits better capture the plain meaning of § 507(a)(4), I would join them.

Appendix A

I

When construing a statutory provision, we begin with an analysis of the statute's language. *See, e.g., Landreth Timber Co. v. Landreth,* 471 U.S. 681, 685 (1985). If the language is unambiguous and "the statutory scheme is coherent and consistent," we apply the statute as written. *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enterprises,* 489 U.S. 235, 240 (1989)) (internal quotation marks omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341.

Moreover, in construing provisions of the Bankruptcy Code, we keep in mind its overriding objective of providing to creditors equal distribution of a debtor's limited resources. *See Isaac v. Temex Energy, Inc. (In re Amarex, Inc.),* 853 F.2d 1526, 1530 (10th Cir.1988). Because of this broad equitable purpose, statutory priorities must be narrowly construed. *See Travelers Prop. Cas. Corp.,* 224 F.3d at 517; *New Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund,* 886 F.2d 714, 719 (4th Cir.1989); *Isaac,* 853 F.2d at 1530. Stating this principle as a rule of statutory construction, the claims of a class of creditors may receive preferential or priority treatment from bankruptcy courts *only* when authorized by Congress in clear and unequivocal terms. *See United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, 31, 33 (1959). It follows that if a particular type of unsecured claim is not clearly and unequivocally listed in 11 U.S.C. § 507(a), which enumerates the Bankruptcy Code's priorities,

then Congress had no intention of giving the claim priority, *see Nathanson v. NLRB,* 344 U.S. 25, 29 (1952); *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.),* 831 F.2d 106, 110 (6th Cir.1987), and we would not be free to create a new priority, *see Caminetti v. United States,* 242 U.S. 470, 485 (1917).

II

In this case, we consider whether 11 U.S.C. § 507(a)(4) *clearly* grants priority to claims for unpaid workers' compensation insurance premiums. Before turning to the specific language of § 507(a)(4), it is useful to give context to the enactment of that section, *see Robinson,* 519 U.S. at 341, which in this case provides substantial assistance in understanding the statutory language employed by Congress.

Congress enacted § 507(a)(4) in 1978 specifically to overrule the holdings in two Supreme Court cases: *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29 (1959), and *Joint Industry Board v. United States,* 391 U.S. 224 (1968). In *Embassy Restaurant,* the Court construed the predecessor to § 507(a), 11 U.S.C. § 104(a)(2) (repealed 1978), which established a priority in bankruptcy for claims of "wages . . . due to workmen," and held that a claim for contributions by an employer to a union welfare plan owed under the terms of a collective bargaining agreement did not constitute "wages . . . due to workmen." 359 U.S. at 30-31. Trustees of the welfare plan, which had been formed to maintain life insurance, weekly sick benefits, hospital benefits, and other advantages for union members, *id.* at 30, argued that "since unions bargain for these contributions as though they were

wages and industry likewise considers them as an integral part of the wage package, they must in law be considered wages," *id.* at 33 (internal quotation marks omitted). Rejecting this argument, the Supreme Court held that fringe benefits payable through a plan "cannot be treated as being within the clear, unequivocal language of 'wages . . . due to workmen.'" *Id.*

Likewise, in *Joint Industry Board,* the Supreme Court, following its decision and rationale in *Embassy Restaurant,* held that a claim for an employer's unpaid contributions to an employees' annuity plan established by a collective bargaining agreement was not a claim for "wages . . . due to workmen" under 11 U.S.C. § 104(a)(2) (repealed 1978). *See* 391 U.S. at 226-28.

In response to these two decisions, Congress enacted § 507(a)(4) to give priority status to claims for such fringe benefits—the "contributions" to employee benefit plans referred to in *Embassy Restaurant* and *Joint Industry Board.* As Congress explained:

Paragraph (4) overrules *United States v. Embassy Restaurant,* which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered. H.R.Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (internal citation omitted). That

purpose is now captured in the text of § 507(a)(4), which reads:

> (a) The following expenses and claims have priority in the following order:
>
> * * *
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan arising from services rendered within 180 days [of the filing of a petition]. . . .

In this context, we now turn to the specific question of whether a claim for unpaid premiums for workers' compensation insurance is clearly and unequivocally a claim for "contributions to an employee benefit plan arising from services rendered."

III

In defining the priority granted in § 507(a)(4), Congress used the language the Supreme Court used to describe fringe benefits in *Embassy Restaurant* when it excluded them from "wages . . . due to workmen." *See* 359 U.S. at 29-30 (framing the issue as "whether contributions to an employer welfare fund which are required by a collective bargaining agreement are entitled to priority"). Although Congress could have used broader terms in defining the priority, it selected the terms (1) "contributions" to an (2) "employee benefit plan," and related them to (3) "services rendered" by the employee. These three phrases taken together connote the very fringe

benefits rejected in *Embassy Restaurant* and *Joint Industry Board*. Of course, this is not surprising, because 11 U.S.C. § 507(a)(4) was enacted specifically to overrule these two cases.

The question here is whether a claim for unpaid insurance premiums falls within the class of claims described by Congress as claims for unpaid "contributions to an employee benefit plan arising from services rendered." Stated more succinctly, is workers' compensation coverage a fringe benefit? Several compelling reasons convince me that a claim for unpaid insurance premiums is quite distinct from unpaid "contributions to an employee benefit plan arising from services rendered" and thus is not accorded priority status under the statute.

First, workers' compensation liability is an *employer's* liability imposed by statute in lieu of tort liability. *See Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 911 (W.Va. 1978) (noting that West Virginia's "Workmen's Compensation Act was designed to remove negligently caused industrial accidents from the common law tort system") (emphasis omitted); *Belcher v. J.H. Fletcher & Co.*, 498 F.Supp. 629, 630-31 (S.D.W.Va.1980) (same). Thus, rather than constituting the payment of a "benefit" to employees, insurance premiums for workers' compensation are the payments due from an employer in respect to its statutory *liability* and its employees' statutory *rights*. Such payments are not thought to be "contributions," a term that involves a notion of voluntariness. *See Webster's Third New International Dictionary* 496 (Merriam Webster Inc. ed., 1993) (defining a "contribution" as "a sum or thing

voluntarily contributed"). Thus, while payments to a plan for fringe benefits are considered "contributions," payments made to discharge a statutorily mandated liability are not.

Second, the *payment of premiums* to an insurance company for the issuance of a workers' compensation insurance policy is not a contribution "to an employee benefit plan" as that term is used in the statute. Although it would be correct to categorize some employer-funded insurance policies as "employee benefit plans," that categorization is fitting only when the employer voluntarily provides the insurance policy as a fringe benefit to its employees or when the policy is negotiated between the employer and the employees as part of a collective bargaining agreement. A plan arrived at through those methods is quite different from a policy of insurance issued to discharge the statutorily mandated *liability* of an employer for workplace injuries.

Third, the payment of premiums by an employer to an insurance company for workers' compensation insurance coverage is not a surrogate for the payment of wages to employees, as is embraced by the notion of a fringe benefit. *See, e.g., Embassy Restaurant,* 359 U.S. at 32-33. Section 507(a)(4) gives priority *only* to contributions that are considered fringe benefits in the sense that they arise from the employees' "services rendered." The claim for an unpaid insurance premium is not a claim for a contribution arising from "services rendered." While premiums for workers' compensation insurance might be computed by considering the number of employees covered on any given day, the premium is not linked to the "services rendered" by the employees as is required to qualify for priority status under § 507(a)(4).

In short, the plain language of § 507(a)(4), which gives priority to claims for unpaid "contributions to an employee benefit plan arising from services rendered," does not cover claims for unpaid insurance premiums charged to cover the statutory liability of the employer to its employees. The unpaid insurance premium is not an unpaid *contribution;* it is not an unpaid contribution *to an employee benefit plan;* and it does not arise out of an employee's *services rendered* in that it is not a *wage surrogate.*

To read § 507(a)(4) as expansively as do the opinions of Judge King and Judge Shedd not only disregards the explicit language of the statute, but such a reading also violates the underlying ground rules for construing priorities under the Bankruptcy Code. "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate," and "if one claimant is to be preferred over others, the purpose should be clear from the statute." *Embassy Restaurant,* 359 U.S. at 31 (internal quotation marks and citation omitted); *see id.* at 33 (requiring a priority to be "within the clear, unequivocal language" of the statute). I submit it is not clear that § 507(a)(4) intends to give priority to claims for unpaid insurance premiums and therefore we are not free to create such a priority.

To make the construction advanced by his concurring opinion appear reasonable, Judge King has cobbled together selected dictionary definitions and portions of definitions. He has taken the statutory words out of context to stretch them beyond their plain meaning. This approach suffers, I respectfully submit, from the same flaw as does the indiscriminate use of statistics. But even when taking this

approach—an approach that also violates the mandate to construe bankruptcy priorities narrowly—it is facially irrational to assert that payments for mandatory workers' compensation liability fall within the *plain meaning* of the term "contributions to an employee benefit plan arising from services rendered."

Judge Shedd's opinion, concurring in the judgment, aptly notes that Judge King's opinion "picks and chooses from accepted dictionary definitions" to arrive at "one reasonable interpretation," but not "the *only* reasonable interpretation." But Judge Shedd's opinion then proceeds to construe "employee benefit plan" in § 507(a)(4) broadly, employing the definition given for that phrase in ERISA, 29 U.S.C. § 1002(3). Applying that definition out of context, Judge Shedd concludes that insurance for workers' compensation benefits is an "employee benefit plan" that enjoys priority under the Bankruptcy Code.

Judge Shedd's opinion well notes that ERISA explicitly exempts from its coverage any plan "maintained solely for the purpose of complying with applicable workmen's compensation laws." What Judge Shedd's opinion fails to address, however, is the analogous limitation made in the Bankruptcy Code. While § 507(a)(4) gives priority to claims made against the estate for "contributions to an employee benefit plan," that priority is *not* afforded with respect to every "employee benefit plan." The priority is extended only with respect to contributions to employee benefit plans "arising from services rendered." The phrase "arising from services rendered" indicates that not all employee benefit plans are given priority, but only those that function as wage

surrogates. This is an especially important phrase in context because Congress enacted the priority to overrule the Supreme Court's earlier decisions in *Embassy Restaurant* and *Joint Industry Board.*

For the reasons given, I would join the three circuits that have construed § 507(a)(4) not to give priority to claims for unpaid workers' compensation insurance premiums, *see Travelers Prop. & Cas. Corp.,* 224 F.3d at 517; *State Ins. Fund,* 144 F.3d at 717; *Employers Ins. of Wausau,* 62 F.3d at 226-27, expressing regret that we are now widening the split among the circuits.

APPENDIX B — MEMORANDUM OPINION AND ORDER AFFIRMING ORDER OF THE BANKRUPTCY COURT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA DATED DECEMBER 22, 2003 AS CORRECTED DECEMBER 23, 2003

IN THE THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 3:03CV61
(BK No. 02-30289)

IN RE:

HOWARD DELIVERY SERVICE, INC.,

Debtor.

HOWARD DELIVERY SERVICE,

Debtor/Appellee.

v.

ZURICH AMERICAN INSURANCE COMPANY,

Movant/Appellant.

Appendix B

MEMORANDUM OPINION AND ORDER AFFIRMING ORDER OF THE BANKRUPTCY COURT

I. *Procedural History*

On January 30, 2002, appellee, Howard Delivery Service, Inc. ("Howard"), filed a voluntary petition for relief under Chapter 11 of the United State Bankruptcy Code in the United States Bankruptcy Court for the Northern District of West Virginia. On March 17, 2003, Howard filed a request for estimation of the unliquidated claim of appellant Zurich American Insurance Company ("Zurich"). In response to the estimation motion, Zurich filed two amended proofs of claim listing "insurance premiums" as the bases. One claim was an unsecured nonpriority claim in the amount of $595,358.00, and the other was an unsecured priority claim in the amount of $410,215.00. Zurich claimed priority status for the second claim under 11 U.S.C. § 507 (a) (4), which allows priority for contributions to employee benefit plans.

On May 22, 2003, Zurich filed a memorandum in support of priority treatment of the second claim. On June 17, 2003, Howard filed its memorandum in opposition to the priority status claimed by Zurich, to which Zurich replied. On July 15, 2003, the Bankruptcy Court issued a memorandum opinion ordering that Zurich's proof of claim be modified from an unsecured priority claim to an unsecured nonpriority claim.

On July 25, 2003, Zurich filed a motion with the Bankruptcy Court for leave to appeal. Zurich submitted its

opening brief to this Court on October 6, 2003. Howard responded to this brief, and Zurich replied. This Court has now considered all of the matters before it and is of the opinion that the order of the Bankruptcy Court should be affirmed in its entirety.

II. *Jurisdiction and Standard of Review*

This Court has jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8001. This Court reviews the Bankruptcy Court's conclusions of law pursuant to a *de novo* standard of review and its findings of fact for clear error. *See In re NVR*, 189 F.3d 442, 448 (4th Cir. 1999); *see also* Fed. R. Bankr. P. 8013.

III. *Facts*

In 1997, Zurich and Howard entered into an agreement wherein Zurich was to provide Howard with workers' compensation, employer's liability, and automobile liability policies. These policies took effect on July 1, 1997 and remained active until January 22, 2002, when Howard cancelled the policies. Under the terms of the agreement, Howard was required to reimburse Zurich for all losses incurred under the automobile liability policies up to $150,000.00 and all losses under the workers' compensation policies up to $250,000.00. The agreement also allowed Zurich to hold other unliquidated claims against Howard.

Zurich contends that it currently holds a total allowed claim against Howard in the amount of $1,005,573.00, and

argues that $410,215.00 of this claim is entitled to priority status. Zurich seeks priority treatment under 11 U.S.C. § 507(a)(4) for the portion of its claim attributed to unpaid amounts due relating to health, disability, and death benefits provided to Howard's employees under the workers' compensation insurance policies. On appeal, Zurich requests that this Court: (1) grant Zurich a total allowed claim of $1,005,573.00; (2) grant Zurich an allowed unsecured priority claim pursuant to 11 U.S.C. § 507(a)(4), in an amount to be determined on remand, for amounts owed with respect to the workers' compensation policies arising in the 180 days prior to the petition date; (3) grant Zurich an allowed unsecured nonpriority claim for the remainder of the total claim; and (4) grant such other relief as the Court deems appropriate.

III. *Applicable Law*

Title 11, United States Code, Section 504 states in pertinent part:

> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition or

> the date of the cessation of the debtor's business, whichever occurs first . . .

11 U.S.C. § 507(a)(4) (2000).

Section 504(a)(4) was drafted in response to the Supreme Court's holdings in two important cases: *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), and *Joint Industry Board v. United States*, 391 U.S. 224 (1968). The Court in these cases held that the predecessor of section 504(a), 11 U.S.C. § 104 (a) (2) (repealed 1978), did not provide priority status to claims for unpaid employer contributions to union workers' welfare and annuity plans. *See Joint Indus.*, 381 U.S. at 228-29; *Embassy Rest.*, 359 U.S. at 33-35. In response to these holdings, Congress enacted section 504 (a) to entitle these types of plans to priority status. It is now well-established that unsecured claims for unpaid contributions to union-operated employee benefit plans are entitled priority under section 507(a)(4). *See Travelers Prop. & Cas. Corp. v. Birmingham-Nashville Express, Inc.*, 224 F.3d 511, 517 (6th Cir. 2000).

However, because Congress did not define the terms "contribution," "employee benefit plan," or "services rendered" for the purposes of this statute, questions regarding the scope of section 507 (a) (4) have arisen. *See, e.g., Travelers Prop. & Cas. Corp.*, 224 F.3d at 514-15; *In re Integrated Health Servs., Inc.*, 291 B.R. 611, 613 (D. Del. 2003). Specifically, there is a split among the circuits regarding whether workers' compensation insurance premiums constitute "contributions to an employee benefit plan" under section 507(a)(4). The First and the Ninth

Appendix B

Circuits have held that workers' compensation insurers are entitled to priority status, while the Sixth, Eighth, and Tenth Circuits have found that such insurers are not entitled to benefit from this section. *Compare Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993) (finding that workers' compensation insurance is an "employee benefit plan" under § 507(a)(4)), *and In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) (same), *with Travelers Prop. & Cas. Corp*, 224 F.3d at 517 (finding that workers' compensation premiums are not "wage substitutes" and therefore do not fit the § 507(a)(4) priority), *and State Ins. Fund v. Star Foods*, 144 F. 3d 712 (10th Cir. 1998) (same), *and In re HLM Corrp.*, 62 F.3d 224 (8th Cir. 1995) (same). The Fourth Circuit has not addressed this question.

A. *Plain Meaning of the Statute*

One of the issues dividing the circuits is whether the plain meaning of section 507(a)(4) supports priority status for workers' compensation insurers. The courts supporting such priority status have found that the plain language of the statute supports their position, as "underlying payments to injured employees from workers' compensation fit the archetypical examples of employee benefit plans such as health insurance, disability, and pension plans." *In re Integrated Health Servs.*, 291 B.R. at 613.

In contrast, courts disallowing priority status have generally held that the plain meaning of the statute does not support such inclusion because "the claim for unpaid insurance premiums [does] not arise from a 'service.' Instead, it arises from the debtor's failure to pay its insurer. This is

no different from any other claim for a trade debt." *In re HLM Corp.*, 165 Bankr. 38, 41 (Bankr. D. Minn. 1994).

B. *Legislative History*

The two sides also disagree in their interpretation of the statute's legislative history. Cases supporting priority for workers' compensation insurers have found that "there is no clearly expressed legislative intent to exclude workers' compensation benefits from the plain language of section 507(a)(4)." *In re Integrated Health Servs.*, 291 B.R. at 614. These cases have, further reasoned that there is

> no reason for concluding that Congress intended to deny priority to workers' compensation benefit plans while granting the same statutory priority to other plans providing benefits to employees. Nor can we conclude that Congress intended to distinguish between benefit plans that are contractually promised to employees and those that are statutorily required. The purpose of priority, to protect the solvency of benefit plans, is present in both situations.

Plaid Pantries, 10 F.3d at 607.

However, courts finding that section 507(a)(7) priority is not applicable have interpreted the legislative history much differently. They have followed the general principle that "statutory priorities under section 507 of the Code are to be narrowly construed." *In re HLM Corp.*, 165 B.R. 38, 39

(Bankr. D. Minn. 1994). Applying this standard to the legislative history of the Act, they have reasoned that

> [t]he theory behind § 507(a)(4) is that, in the realities of collective bargaining agreement negotiations, employees may give up certain claims for wages in exchange for fringe benefits. As a result, the fringe benefits earned 180 days before the filing of a bankruptcy petition should be entitled to priority in the same way and for the same reason that wages are entitled to priority. H. R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977), [reprinted in] U.S.C.C.A.N. 1978, 5787. The legislative history makes it clear that § 507(a)(4) covers those types of benefits that typically are bargained for in the employer-employee setting whether as part of a collective bargaining arrangement or otherwise.

In re HLM Corp., 165 Bankr. at 41. On this basis, these courts have found that "the term 'employee benefit plan' is limited to wage substitutes." *Travelers Prop. & Cas. Corp.*, 224 F.3d at 517.

Because payments for workers' compensation policies are not bargained-for substitutes for wages, but rather are methods employers use to safeguard their statutory obligations, these courts have concluded that they do not qualify for priority status under this framework. *See In re HLM Corp.*, 62 F.3d at 226; *State Ins. Fund v. Southern Star Foods*, 144 F.3d 712, 716 (10th Cir. 1998) ("[W]orkers' compensation is not an employee benefit plan because the

coverage benefits the employer at least as much, if not more, than the employee."). As articulated by one court,

> Section 507(a)(4) is not to assure the insurance industry that insurers will be paid for their money. It is to ensure that the employees will receive the benefits they bargained for in the course of accepting employment with a debtor. The employees . . . will receive or have received their benefits regardless of whether the insurer is paid its premium.

In re HLM Corp., 165 Bankr. at 42.

IV. *Discussion*

The United States Bankruptcy Court for the Northern District of West Virginia, in declining to afford Zurich priority status, concluded that

> Congress intended 507(a)(4) to overrule *Embassy Restaurant* and, as can be determined from . . . its history, intended the section's priority treatment to be tied to bargained-for, wage-substitution-type benefits. A debtor's unpaid workers' compensation insurance premiums are not afforded priority treatment. While these premiums are unarguably a benefit for employees, they are required by statute and thus are not considered "an employee benefit plan" under the Bankruptcy Code.

In re Howard Delivery Service, Inc., No. 02-30289, slip op. at 5 (Bankr. N.D. W. Va. July 15, 2003).

Appendix B

In its opening brief, Zurich argues that the Bankruptcy Court erred in: (1) relying on the legislative history of 11 U.S.C. § 507(a)(4) to support a decision that is in contradiction to the plain, ordinary meaning of the language of the statute itself; and (2) ruling that priority under 11 U.S.C. § 507(a)(4) is available only for "bargained for" benefits. Zurich argues that the "better reasoned cases . . . hold that such premiums are entitled to priority under section 507(a)(4)." Appellant's Opening Br. at 11.

In its response, Howard argues that, while there is a split among the circuits regarding whether unpaid premiums for insurance covering workers' compensation liability should be treated as priority claims, the greater weight of authority refuses to afford such priority to these premiums. Moreover, Howard argues that claims by insurers for unpaid insurance premiums, even if the premiums are for coverage under an employee benefit plan, are not entitled to section 507(a)(4) priority because they arise from the sale of insurance on credit, and not from the services provided by employees. Finally, Howard disagrees with Zurich's assertion that the Bankruptcy Court improperly examined the legislative history of the statute. Howard argues that the analysis was appropriate because the relevant statutory language is ambiguous.

Upon careful analysis of this issue, this Court agrees with the finding of the Bankruptcy Court that Zurich is not entitled to the priority afforded by section 507(a)(4). To hold otherwise is to excessively broaden the scope of the statute. An agreement by a third party to provide workers' compensation insurance to an employer should not be

considered a "contribution" to an employee benefit plan. Zurich entered into an agreement with Howard to provide insurance upon the payment of premiums. Its relationship could easily be construed as a protector of the interests of Howard, the employer, rather than Howard's employees, because the insurance is designed to shield Howard from the liability of providing workers' compensation benefits.

Moreover, the distinction between such statutorily-mandated insurance programs as workers' compensation and contractually bargained-for benefits such as life and health insurance should not be casually rejected. As noted by the Eighth Circuit, "workers' compensation insurance is a system mandated by statute. Employers cannot offer (and employees cannot accept) higher wages as a substitute for workers' compensation benefits." *In re HLM Corp.*, 62 F.3d at 225. For this reason, such premiums should not be construed as "fringe benefits" under the statute. In explaining the purpose and effect of section 507(a)(4), Congress stated:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, which held that fringe benefits were not entitled to wage priority status. *The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted.* The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the bankruptcy case and the total of all contributions payable under this paragraph . . .

Appendix B

H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis added). Workers' compensation, while of great benefit to employees, cannot be considered a wage substitute. Thus, the premiums due to the workers' compensation insurer should not be encompassed within the "fringe benefits" that are entitled to priority under section 507(a)(4).

V. *Conclusion*

For the reasons stated above, this Court hereby AFFIRMS the decision of the United States Bankruptcy Court for the Northern District of West Virginia. This civil action is hereby STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: December 22, 2003

s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA ENTERED JULY 15, 2003

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

BK NO. 02-30289

IN RE

HOWARD DELIVERY SERVICE,
INCORPORATED,

Debtor(s).

MEMORANDUM OPINION

Facts[1]

On January 30, 2002, Howard Delivery Service, Inc. ("Howard") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On May 9, 2002, Zurich American Insurance Company ("Zurich") filed two proofs of claim listing "insurance premiums" as the bases. Zurich's first claim[2] was classified as an unsecured priority claim and administrative expense and its second[3] was classified as an

1. Many of the facts not relevant to *the issue* presented are omitted for clarity.

2. Designated by the Court as Proof of Claim number 120.

3. Designated by the Court as Proof of Claim number 121.

unsecured nonpriority claim. The amounts of both claims were listed as "unliquidated." In mid-March 2003, Howard moved the Bankruptcy Court to estimate the allowance of the unliquidated claims.

On March 28, 2003, Zurich filed amended claims. The unsecured priority claim was amended[4] to list $410,215 as the amount and it was classified as "contributions to an employee benefit plan." The second claim was amended[5] to list $529,358 as the amount. Howard takes issue with the amount of Zurich's $410,215 unsecured priority claim and, because the basis of the claim is unpaid workers' compensation insurance premiums, with its classification as "priority" under 11 U.S.C. § 507(a)(4). As an essential first step in resolving both issues, this opinion addresses only Zurich's classification of its first proof of claim as "priority" for "contributions to an employee benefit plan" under § 507(a)(4).

Discussion

Section 507(a)(4) of the Bankruptcy Code reads:

> (a) The following expenses and claims have priority in the following order:
>
> * * *

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4. Designated by the Court as Proof of Claim number 306.

5. Designated by the Court as Proof of Claim number 307.

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of

(i) the number of employees covered by each such plan multiplied by $4,650; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

Although the Fourth Circuit has not addressed the issue of whether premiums for workers' compensation insurance policies are afforded § 507(a)(4) priority, four other circuits have. The Sixth, Eighth, and Tenth Circuits all agree that workers' compensation insurance is not an employee benefit plan under § 507(a)(4). *Travelers Property Casualty Corp. v. Birmingham-Nashville Express, Inc.*, 224 F.3d 511 (6th Cir. 2000); *Employers Insurance of Wausau, Inc. v. Ramette (In re HLM Co.)*, 62 F.3d 224 (8th Cir. 1995); *State Insurance Fund v. Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir.

1998). After careful study of the legislative history of § 507(a)(4), all three circuit courts concluded that it was inserted into the Code by Congress to overrule *United States v. Embassy Restaurant*, 359 U.S. 29, 3 L. Ed. 2d 601, 79 S. Ct. 554 (1959), which failed to give priority wage treatment to union-negotiated employee benefits. *Birmingham-Nashville Express*, 244 F.3d at 514; *In re HML Corp.*, 62 F.3d at 225; *Southern Star*, 144 F.3d at 715-16 (citing H.R. Rep. No. 95-595, at 187 (1978) and S. Rep. No. 95-989, at 69 (1978).). Each court distinguished fringe benefits (bargained for wage-equivalents) from workers' compensation premiums (statutory obligations),

One circuit facing the same issue has failed to take a similar view. In *Employers Insurance of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993), the earliest of the cases, the Ninth Circuit addressed but failed to offer meaningful recognition to the distinction between negotiated wage-equivalent benefits and statutorily mandated workers' compensation benefits. The *Plaid Pantries* court did admit that the legislative history of § 507(a)(4) shows that Congress added the sub-section to protect "fringe benefits," but had little difficulty in including workers' compensation insurance premiums as § 507(a)(4) priority "contributions." *Id.* In reviewing the case later, the Eighth Circuit criticized that by rejecting the "distinction between statutorily mandated insurance programs, such as workers' compensation, and contractually arrived at insurance plans, such as those for life and health" the *Plaid Pantries* court "excessively broadened the reach of the Code language in question." *In re HLM Corp.*, 62 F.3d at 227.

Appendix C

Two cases within the Fourth Circuit have addressed issues related to § 507(a)(4), but help very little in the matter here. First, in *Aetna Life Insurance Co. v. The Mantaldo Corp.*, 232 B.R. 853 (M.D.N.C. 1997), the court found that group life and health insurance premiums were to be afforded § 507(a)(4) priority treatment. Although that decision discussed the distinctions between those premiums and workers' compensation *premiums in light of In re HLM Corp.* and *Plaid Pantries*, the court was not called upon to rule on the issue. Second, in *Field v. Maryland Motor Truck Assn*, 259 B.R. 89 (Bankr. D. Md. 2001), the trustee initiated an adversary proceeding and avoided preferentially paid workers' compensation premiums under § 547(b). In the paragraph *preceding* the grant of relief to the plaintiff/trustee, the court opined that "[p]erhaps the defendant's only solace is that it will be entitled to a fourth priority claim against the estate for contributions to an employee benefit plan pursuant to Section 507(a)(4)." *Id.* at 96. While an endorsement for priority treatment of Zurich's claim, it is mere dicta.

As Zurich mentioned in its memorandum in support of priority status for its claim, the most recent court to consider the matter held that workers' compensation insurance premiums are entitled to priority treatment under § 507(a)(4). *In re Integrated Health Services, Inc.*, 291 B.R. 611 (Bankr. D. Del. 2003). In *Integrated Health* the bankruptcy court found sufficient clarity in the plain meaning of the Code to afford priority treatment. Even after an (unnecessary) inquiry into the legislative history, and even while admitting that § 507(a)(4)'s genesis was Congress's "response to the decision in *United States v. Embassy Restaurant* (*id.* at 615),

the court concluded there to be no "logical basis for excluding workers' compensation insurance premiums from section 507(a)(4)." *Id.* at 613. This Court disagrees.

First, from a reading of *Embassy Restaurant* it is perfectly clear that the Supreme Court was dealing exclusively with the issue of whether the Code's priority claim section[6] for "wages . . . due to workmen" included employer contributions to a labor union welfare fund to maintain "'life insurance, weekly sick benefits, hospital and surgical benefits' acid other advantages for members of the locals" *Embassy Restaurant*, 369 U.S. at 30. The nature of the contributions as "bargained for" was the very heart of the issue. In fact, the first sentence of the opinion reads in part: "The sole issue involved here is whether contributions by an employer to a welfare fund *which are required by a collective bargaining agreement* are entitled, in bankruptcy, to priority. . . ." *Id.* at 29 (emphasis added). An amendment to the Bankruptcy Code enacted to overrule *Embassy Restaurant* necessarily addresses the same issue as the case. Second, Judge Walrath points out in *Integrated Health* that Congress did not specifically exclude workers' compensation insurance premiums from the scope of § 507(a)(4). But for this conclusion she admittedly quotes an excerpt from congressional reports made after the reports "*referenc[e] labor contract negotiations*" *Integrated Health*, 291 B.R. at 614 (discussing H.R. Conf. Rep. No. 95-595 at 357-58 (1977); S. Conf. Rep. No. 95-989, at 67-73 (1978).). This Court disagrees with the conclusion reached in *Integrated Health* that nothing in the language of the Code nor its history indicates that § 507(a)(4) excludes workers' compensation premiums.

6. 11 U.S.C. § 104, in 1959.

Appendix C

Conclusion

Congress intended § 507(a)(4) to overrule *Embassy Restaurant* and, as can be determined from the its history, intended the section's priority treatment to be tied to bargained for, wage-substitution-type benefits. A debtor's unpaid workers' compensation insurance premiums are not afforded priority treatment. While these premiums are unarguably a benefit for employees, they are required by statute and are thus not considered "an employee benefit plan" under the Bankruptcy Code.

As such, it is **ORDERED** that Zurich's proof of claim for unpaid workers' compensation insurance premiums be **MODIFIED** from an unsecured *priority* claim to an unsecured *non priority* claim.

The Clerk is directed to transmit copies of this Order to the parties in interest.

ENTER: 7/15/03

s/ [illegible]
U.S. Bankruptcy Judge